

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Application by
Minnesota Power for Authority to
Increase Rates for Electric Service in
Minnesota

**ORDER ON MOTION TO
COMPEL DISCOVERY**

This matter came before Administrative Law Judge Kathleen D. Sheehy on a Motion to Compel Discovery filed on March 17, 2010, by the Office of the Attorney General, Residential and Small Business Utilities Division (OAG). Minnesota Power responded to the motion on March 26, 2010. The motion record closed that day.

Ronald M. Giteck and William T. Stamets, Assistant Attorneys General, appeared for the OAG.

Christopher D. Anderson, Associate General Counsel; and Sam Hanson, Thomas Bailey, and Elizabeth M. Brama appeared for Minnesota Power.

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judge make the following:

ORDER

The OAG's Motion to Compel Discovery is DENIED.

Dated: March 29, 2010

s/Beverly Jones Heydinger for

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

In this pending rate case, Minnesota Power included \$1,841,000 in travel, entertainment, and employee expenses in the 2010 test year.¹ In its initial testimony, Minnesota Power indicated that it did not seek to recover any employee expenses for its top six senior executives and that it had reduced employee expenses for the remaining officer group by 25%, in order to limit the issues in the rate case.² This discovery dispute concerns only the amount of employee expenses that Minnesota Power maintains were removed from the test year. The OAG seeks to corroborate the claim that these expenses were removed.

On December 31, 2009, the OAG served 26 information requests seeking information relating to Minnesota Power's corporate credit card and other employee expenses.³ The parties met several times, and Minnesota Power responded several times to these information requests. The OAG now moves to compel additional responses to Information Request Nos. 601, 606, and 614. Minnesota Power argues that it should not be required to respond further, because the OAG is seeking detail about expenses that are not included for recovery, would shed no light on whether the claimed amount is reasonable, and accordingly falls outside the scope of permissible discovery.

The rules of the Office of Administrative Hearings specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed and authorize the filing of motions to compel. The rules further state that a party bringing a motion to compel must show the discovery is needed for the proper presentation of its case, is not for delay, and the issues or amounts in controversy are significant enough to warrant the discovery. The party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.⁴

Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.⁵ It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate

¹ OAG Memorandum at 4.

² Direct Testimony of Steven DeVinck at 10-11.

³ Affidavit of Thomas E. Bailey ¶ 3.

⁴ Minn. R. 1400.6700, subp. 2.

⁵ See, e.g., *Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961).

hearing or trial.⁶ Administrative Law Judges at the OAH “have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts.”⁷

The definition of relevancy in the discovery context has been broadly construed to include any matter “that bears on” an issue in the case or any matter “that reasonably could lead to other matter that could bear on any issue that is or may be in the case.”⁸ As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.⁹ In summary, “matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment.”¹⁰ The definition of “relevancy” for discovery purposes is not limited by the definition of “relevancy” for evidentiary purposes. Thus, information that is deemed relevant at the discovery stage may not necessarily be admissible evidence at the hearing.¹¹

Information Request No. 601. This request asks Minnesota Power to provide the total company and Minnesota retail jurisdictional cost of employee expenses for the top six senior executives by individual executive before exclusion from the test year. It asks Minnesota Power to categorize the costs being removed as travel, entertainment, meals, or other.¹²

In its response, Minnesota Power directed the OAG to Workpaper E-10 in Volume IV for the amounts excluded for each of the top six individual officers. It further responded that the budget amount was not developed at the level of detail requested and that 2008 actual expenses were used to develop the 2010 test year exclusion amount.¹³

The OAG served Information Request No. 601A on March 2, 1010. In this request, the OAG asked Minnesota Power to provide the total budgeted and test year amounts for all employees; to confirm the budgeted amount for the group of selected executives; and to confirm total amounts budgeted and test year

⁶ See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), quoted with approval in *Jeppesen v. Swanson*, 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (1956).

⁷ G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 8.5.2 at 135 (1998).

⁸ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

⁹ *Boland v. Morrill*, 270 Minn. 86, 132 N.W.2d 711, 719 (1965).

¹⁰ G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 9.2 at 146 (1998).

¹¹ 2 D. Herr & R. Haydock, *Minnesota Practice* 9 (2d Ed. 1985), citing *Detweiler Brothers v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).

¹² Bailey Aff. Exh. A.

¹³ *Id.*

amounts for board of directors activities. On March 12, 2010, Minnesota Power responded to this request, in relevant part, by providing total budgeted expenses for all employees and explaining again that the company does not develop travel and entertainment budgets for individual employees or for the group of employees identified by the OAG. When the rate case was filed, the company used actual 2008 expenses as a proxy to develop the 2010 exclusion amounts of \$334,164 for senior executives and \$180,250 for miscellaneous board expenses.¹⁴ Minnesota Power maintains that after responding to Information Request 601A, it received no further requests from the OAG for additional responsive information.¹⁵

In this motion the OAG argues that, because Minnesota Power has refused to provide specific credit card charges and expense reports associated with its top six executives, as requested in other information requests, it is unable to determine whether the amounts excluded in Workpaper E-10 are reasonable. It contends that Minnesota Power should be compelled to provide “the total and Minnesota retail jurisdictional cost of employee expenses for the top six senior executives by individual executive before exclusion from the test year.”¹⁶ Minnesota Power maintains it has provided all the responsive information requested for the individual executives.

The OAG has failed to show that Minnesota Power’s response to this information request is incomplete, or how information regarding credit card charges would enable it to determine whether the amounts excluded from the test year were reasonable. Its motion to compel a further response to Information Request 601 is DENIED.

Information Request No. 606. This request asks Minnesota Power to provide a listing of all corporate credit cards in the name of Allete, Minnesota Power, or any employees. It further requests a copy of the credit card billing statements for calendar years 2008 and 2009 for all employees at the level of vice-president or above, and for any credit card that incurred charges over \$500 in two consecutive months. For each statement provided, the request asks Minnesota Power to indicate the dollar amount assigned or allocated to the Minnesota retail jurisdiction.¹⁷

On January 15, 2010, Minnesota Power responded by objecting to the request as being overly broad, unduly burdensome, and not reasonably relevant, in that it included expenditures for both regulated and unregulated business; it encompassed personal expenses incurred by employees; and it was duplicative of other information provided in response to other information requests. In addition, Minnesota Power stated that because there were 605 employees with

¹⁴ Bailey Aff. ¶ 5 & Ex. B.

¹⁵ Minnesota Power Memorandum at 7.

¹⁶ OAG Memorandum at 7.

¹⁷ Bailey Aff. Ex. C.

expenditures of more than \$500 in two consecutive months, it would be necessary to produce 5,000 separate credit card statements. For each of these statements, Minnesota Power would be required to separate regulated costs from unregulated costs, remove O & M expenses, categorize the expenses into the requested categories, and then determine whether any of these costs were allocated to the Minnesota jurisdiction. In addition, it stated that the information requested was not reasonably relevant because the 2010 test year budget was not based on individual credit card statements or line items in those statements, but was based on cost allocated to an activity regardless of how the employee paid for the expense. It provided the names of all employees and officers holding corporate credit cards and a list of all employees who incurred charges greater than \$500 in two consecutive months. The list included the names of the employee, the month the charges were incurred, and the total amount incurred per month.¹⁸

In later discussions with Minnesota Power, the OAG apparently agreed to limit the request to a sample of 38 employees who the OAG considered to have unusually high credit card charges, plus all employees at the vice-president level and above that were not already in the group of 38. On March 15, 2010, Minnesota Power provided the requested credit card statements and supporting documentation for all of the employees identified by the OAG, except for the top six executives and one executive administrative assistant. The company refused to provide these credit card statements because no expenses for these employees had been included in the test year.¹⁹ The OAG subsequently issued Information Request Nos. 606a, 606b, and 606c seeking credit card information for these executives and the administrative assistant. Minnesota Power provided monthly credit card billing totals for the executive assistant, but it refused to provide the credit card statements for her or for the six executives.²⁰

On March 15, 2010, Minnesota Power and the OAG had a telephone conference to discuss the issue of credit card statements and expense reports (requested in Information Request No. 614). During this discussion, Minnesota Power agreed to provide a reconciliation of the executive assistant's monthly employee expenses and the associated expense for this employee reflected in Workpaper E-10. In addition, the company agreed to provide the same reconciliation tying monthly employee expenses amounts for the top six executives to the annual cost exclusion for each executive shown in Workpaper E- 10. In addition, the Company provided workpapers that compared this group's total employee expense amounts for 2007, 2008, and 2009, to address the OAG's argument that it needed to determine whether the 2008 costs that were excluded from the test year were reasonable, compared to other years. The Company provided this information to the OAG on March 17, 2010.²¹

¹⁸ Bailey Aff. Exs. C & D.

¹⁹ Bailey Aff. ¶ 7.

²⁰ Bailey Aff. ¶¶ 8-10; Exs. E – H.

²¹ Bailey Aff. ¶¶ 16-21 & Ex. L.

The OAG contends that without the credit card charges and expense report data, it cannot determine whether the amounts excluded from the test year were reasonable. Corporate expenses are an important and legitimate area of inquiry, but the OAG has failed to show how credit card statements for these employees would enable it to determine whether the amounts *excluded* from the test year were reasonable. The Company has provided total expense amounts for these executives in other years for comparison purposes. The OAG's motion to compel a further response to Information Request 606 is DENIED.

Information Request No. 614. This information request asks Minnesota Power to provide expense reports (with all required documentation) for all board members and employees at the level of vice-president and above for 2008 and 2009, in which at least some of the costs were assigned or allocated to the Minnesota retail jurisdiction. It also asked the Company to provide the business purpose for each expense.²²

Minnesota Power responded to the request by objecting on the basis that the request was overly broad, unduly burdensome, and not reasonably relevant, as it had done with regard to the credit card expenses; however, the Company provided the expense report amounts and associated business purpose (not the reports themselves) for all employees and board members, except for the top six executives whose expenses were excluded from the test year.²³ After additional discussion with the OAG, Minnesota Power provided the actual expense reports for the previously identified employees, except for the top six executives, whose expenses were not included in the test year.²⁴

On March 17, 2010, Minnesota Power provided to the OAG workpapers that tied monthly employee expense amounts for the top six executives to the annual cost exclusion for each executive shown in Workpaper E- 10. In addition, the Company provided workpapers that compared this group's total employee expense amounts for 2007, 2008, and 2009, to address the OAG's argument that it needed to determine whether the 2008 costs that were excluded from the test year were reasonable, compared to other years.²⁵

The OAG again maintains that it needs the expense reports for these executives so that it may determine whether the amounts excluded from the test year were reasonable. Minnesota Power has provided reams of information about its employee expenses, and it has provided information about the amounts of expense incurred by these executives, along with verification that these amounts were 100% excluded from the test year. It has provided comparative information for other years. The OAG has a great deal of information about the

²² Bailey Aff. Ex. I.

²³ Id.

²⁴ Bailey Aff. Exs. J & K.

²⁵ Bailey Aff. ¶¶ 16-21 & Ex. L.

expenses that were claimed and included in the test year; it has failed to show that it needs more information about expenses that were not. Its motion to compel a further response to Information Request No. 614 is DENIED.

K.D.S.